SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1416

TRANS WORLD AIRLINES, INC. AND
AMERICAN AIRLINES, INC.,
Petitioners,

vs.

ANNE B. ZIPES, PATRICIA A. SANTINI, PAMELA J. DAILING, DARLENE PRESTON, BONNIE PULSKAMP, SUSAN PRASCIUNAS, MARSHA JIMERSON, PHYLLIS STILL, ELISABETH KORENGOLD, CHERYL ROSSI, AND AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO,
Respondents.

REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Respondents' brief, opposing *certiorari,* attacks with abusive language* the reasonableness of the class action settlement and the fairness of the union's class representation. The District Court decided these factual issues against respondents after a full hearing where respondents' present counsel made the same

* The record fully refutes respondents' charges of "blatant falsehood" (p. 2), "fraud on the stewardesses and on the courts" (p. 2), "illicit bargains" (p. 5), "woefully inadequate" representation (p. 7), "secret collaboration" (p. 7). See Vols. I and II of a Supplemental Appendix submitted by the airline petitioners, who were appellees in the Court of Appeals.

abusive arguments (II Supp. App. 408 *et seq.*). The Court of Appeals did not reverse these factual rulings. Instead, it reversed on the strictly legal theories that the union's class representation is conclusively presumed inadequate because of conflicts of interest and the class actions were under Rule 23(b)(3) rather than (b)(2) of the Federal Rules of Civil Procedure. These theories raise the two important questions for review stated in the airlines' petition (p. 2). The errors in these theories, which mean that the union could not negotiate a Title VII class action settlement regardless of its fairness, are obscured by respondents' vituperation.

Respondents seek to create the impression that a "majority" or "over 130" of the 600 terminated stewardesses objected to the settlement (p. 7, n4). The objections were solicited by respondents Zipes and Preston with materials giving one-sided explanations of the settlement (I Supp. App. 99-104). This solicitation of class members violated the District Court's Rule 22, which forbids parties and their counsel in class actions to communicate with class members without the District Court's approval (See II Supp. App. 148). Neither the union nor either airline communicated with class members to seek their support of the settlement or correct respondents' misrepresentations.

In attacking the merits of the settlement, respondents state (p. 3, n2), citing *Cleveland Board of Education* v. *LaFleur*, ... U. S. ....., 39 L. Ed. 2d 52 (1974), that the "unlawfulness of termination and refusal to rehire because of pregnancy is beyond question". But in *LaFleur* the school board's pregnancy rules were held unreasonable and a violation of substantive Due Process rather than invalid sex discrimination under the Equal Protection Clause, which would have been an easier theory to apply if justified by the facts. As a result, the *LaFleur* decision does not indicate that the airlines' pregnancy practice was sex discrimination in violation of Title VII of the 1964 Civil Rights Act. See airlines' *certiorari* petition, pp. 19-20, n***.

Respondents' brief is devoted mainly to an attack on the union's petition in which, as the airlines' petition states (p. 8), the questions presented for review are too narrow for the serious problems created by the Court of Appeals' decision. The unusually strong reasons for review stated in the airlines' petition are not refuted in respondents' opposing brief.

I.

NEED FOR REVIEW OF COURT OF APPEALS' OUSTER OF UNION FROM SETTLEMENT NEGOTIATIONS

Respondents' main legal contention against review is that this Court's *Alexander* decision of February 1974* strongly supports the Court of Appeals' ouster of the union from the settlement of class actions under Title VII of the 1964 Civil Rights Act. If the *Alexander* holding means what respondents say of the individual nature of Title VII remedies, it would prevent any Title VII class action except to obtain an injunction. For no representative could "fairly and adequately" protect the interests of individual class members, as required by Rule 23(a)(4); and the strong interest of class members in individually controlling their separate Title VII actions would preclude an adjudication binding on all class members. Nor could there be a Title VII class action settlement, which would necessarily dispose of class members' claims on a collective basis without a precise remedy fitting each member's Title VII rights.

Respondents (pp. 10-1) make a bold attempt to demonstrate that the decision below accords with the decision in *Western Addition Community Organization* v. *NLRB*, 485 F. 2d 917 (D. C. Cir. 1973), in which this Court has granted *certiorari* (Docket No. 73-696, under the title *Emporium Capwell Co.* v. *Western Addition Community Organization*). The relationship in that case between the National Labor Relations Act and

* *Alexander* v. *Gardner-Denver Co.*, ... U. S. ....., 39 L. Ed. 2d 147 (1974), differentiated in airlines' petition (pp. 22-4).

Title VII in considering the discharge of two employees charging racial discrimination is analogous to the relationship of Railway Labor Act policies and practice to Title VII remedies for alleged sex discrimination in employment in the present case. The Solicitor General's *certiorari* petition in this Court sought an overruling of the limitation imposed by the Court of Appeals under Title VII on an NLRB determination. It would be inconsistent with the granting of *certiorari* in the *Western Addition* case to deny *certiorari* in the present case, particularly in view of the serious consequences of this 600-class member precedent in other litigation.

The respondents and the Court of Appeals take the same inconsistent position. The Court of Appeals holds a union is unable to negotiate a settlement of Title VII remedies even though the settlement is to be approved by the District Court. Yet the Court of Appeals, as its remanding order indicates (p. A14), would permit a settlement to be negotiated by a non-union class representative chosen by the happenstance of the filing of a District Court complaint.

Respondents' severe attack on the union and its counsel as representatives of the terminated stewardesses does not affect the airlines. The union, which is the airlines' traditional adversary, is the stewardesses' statutory representative, chosen by them under the Railway Labor Act (§ 2, Fourth, Airlines' Pet'n. p. A16). This statute and this Court's decisions under it require the airlines to negotiate with the union as the stewardesses' representative. The airlines should not be penalized if, as respondents claim, the union failed to communicate with the named stewardess-plaintiffs and favored employee stewardesses in the settlement. The airlines have no duty, in fact they are forbidden, to police the union's relationship with employees. If the union failed to do its duty, the terminated stewardesses have an establshed remedy to sue the union for damages under the Railway Labor Act. *Steele* v. *Louisville & Nashville R.*

Co., 323 U. S. 192, 203 (1944), and later cases;* see Airlines' Pet'n., pp. 11-13.

II.

NEED FOR REVIEW OF COURT OF APPEALS' MISAPPLICATION OF RULE 23

Respondents barely mention (pp. 11-2) the Court of Appeals' far reaching holding that the class actions for terminated stewardesses were under Rule 23(b)(3) and not Rule 23(b)(2) of the Federal Rules of Civil Procedure. Their comment (p. 11) that the three conflicting decisions in other Circuits did not consider "the relative merits of a Rule 23(b)(2), as opposed to a 23(b)(3), classification" overlooks the overwhelming force of these and the other strong contrary authorities cited in our petition (pp. 33-6). These authorities are traceable to Chief Judge Ryan's early analysis of the relative merits of the (b)(2) and (b)(3) classes. Respondents represent (pp. 11-2) that this Court's Advisory Committee made a statement about Rule 23(b)(2) that would support the Court of Appeals' holding. Respondents refer to the text of the Advisory Committee Notes in 28 U. S. C. A., but without any page reference. A careful reading of the entire Notes on Rule 23 does not reveal anything like the respondents' representation.

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* Respondents (p. 5) cite a recent case which shows clearly that employees may sue the union for damages for inadequate representation. *Waters* v. *Wisconsin Steel Works*, 427 F. 2d 476, 490 (C. A. 7, 1970), *cert. den.* 400 U. S. 911.

CONCLUSION

Respondents' Conclusion (p. 13) charges that the petitioners "in arrogant disregard of the civil rights of 600 women, already have delayed this litigation too long". Petitioners have been very diligent in pursuing these cases since they were filed in August 1970. Petitioners entered into a settlement of one phase of the cases in October 1970 and another phase in July 1971. District Court approval, delayed by an appeal by the Equal Employment Opportunity Commission, was given in March 1972. On respondents' appeal to the Court of Appeals, they obtained so many extensions of time to file their briefs that the argument did not occur until September 1973. It is not petitioners who have caused delays. Petitioners respectfully urge that the turning back of the litigation to its inception, as directed by the Court of Appeals' mandate, should be prevented by this Court's review and reversal of the Court of Appeals' decision.

Respectfully submitted,

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